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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1471

(Consolidated with Nos. 76-1521, 76-1595, 76-1604, 76-1624 and 76-1685)

FEDERAL COMMUNICATIONS COMMISSION,

Petitioner,

v.

NATIONAL CITIZENS COMMITTEE FOR BROADCASTING, et al.,

Respondents.

MOTION OF THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE*

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MOTION OF THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE AMERICAN CIVIL LIBERTIES UNION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The Office of Communication of the United Church of Christ, the National Association for the Advancement of Colored People and the American Civil Liberties Union hereby respectfully move, pursuant to Rule 42 of this Court's rules, for leave to file the within brief as *amici curiae* in support of affirmance of the judgment of the United States Court of Appeals for the District of

Columbia Circuit. Consent to the filing of this brief has been granted by Petitioner, Federal Communications Commission, and by Respondent, National Citizens Committee for Broadcasting. However, consent was refused by the National Association of Broadcasters, necessitating the instant motion.[1]

The Office of Communication of the United Church of Christ ("UCC") is the national instrumentality of the United Church of Christ which is charged by the Church Constitution with its ministry to the mass media. The United Church of Christ is composed of independent local congregations having about 1.8 million members. UCC has long been concerned with the protection of citizen rights in the broadcast media, including the paramount right to diverse sources of information.

The National Association for the Advancement of Colored People ("NAACP") is a non-profit membership association representing the interest of more than 500,000 members throughout the United States. For many years the NAACP has sought through the courts to establish and protect the civil rights of minority citizens. It has often appeared before state and federal courts and administrative bodies as complainant and as an *amicus* in cases dealing with fundamental human rights.

The American Civil Liberties Union ("ACLU") is a nationwide non-partisan organization of over 200,000 members, dedicated to defending the Bill of Rights. Central among those rights are those embodied in the First Amendment.[2] Since 1945, it has been the policy of the

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[1] The NAB argued that the parties already involved represent a broad spectrum of viewpoints on the issues. While there appears to be a proliferation of parties, including *amici*, arguing for reversal, we believe that at most one additional *amicus* (who was also refused consent by newspaper-broadcast interests), will be filing a brief in support of affirmance.

[2] UCC and ACLU participated as *amici* in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

ACLU to urge government action to promote greater competition and thus to encourage diversity where economic concentration in the communications field acts to deny the public access to many sources of news, information and opinion.

This case involves the procedural regularity and rationality of the decision of the Federal Communications Commission ("Commission") to exempt existing co-located newspaper-television combinations from its policy against such combinations except in cases of "effective local media monopoly" or of "specific showing of public harm."[3] The Court of Appeals for the District of Columbia Circuit[4] found that the exemption did not "encourage the larger and more effective use of radio in the public interest" (47 U.S.C. § 303(g)), or enhance First Amendment goals of diversity (555 F. 2d at 962-63). The Court further found that the considerations found by the Commission to outweigh First Amendment goals were speculative and unsupported by the record. Finally, the Court noted that the Commission had not only unreasonably maintained the status quo, but had "solidifie[d] the position of existing combinations by making petitions to deny more difficult." (*Id.* at fn. 108).

Amici submit this brief so that the correctness of the Circuit Court's decision need not be examined in a vacuum. Each of them is currently engaged in renewal challenges involving newspaper/television cross ownerships. The Commission's dismissals of two of these challenges were grounded on the *Second Report*. Appeals have been stayed pending this Court's decision herein. Action on the third challenge is apparently being held in abeyance by the Commission.

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[3] *Second Report and Order*, Docket 18110, 50 FCC 2d 1046 (1975), *reconsideration*, 53 FCC 2d 589 (1975) (hereinafter "Second Report").

[4] *National Citizens Committee for Broadcasting* v. *FCC*, 555 F. 2d 938 (D.C. Cir. 1977).

These cases demonstrate three main points. One is that the *Second Report* sanctions the continued existence of newspaper/broadcast combinations that exert a predominant and unhealthy control over local sources of news and discussion of public issues. Another is that the supposed dangers to the public interest in separating newspaper and television ownerships advanced by the Commission do not exist in these markets in any significant degree, and probably are not significant in most markets. The final point is that the newly enunciated standards for designation of renewal hearings on concentration issues—when coupled with the policies of denying discovery and requiring *prima facie* proof at the pleading stage—frustrate exploration of the public interest factors involved.

In a word, *amici* believe that a brief examination of the *Second Report* as applied in three television markets will aid the Court in its evaluation of the Commission's action.

Wherefore, *amici* respectfully move for leave to file the within brief.

Respectfully submitted,

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IN THE

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BRIEF *AMICI CURIAE* OF THE OFFICE OF COMMUNICATION OF THE UNITED CHURCH OF CHRIST, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE AND THE AMERICAN CIVIL LIBERTIES UNION

Preliminary

This brief is submitted in support of affirmance of the judgment of the United States Court of Appeals for the District of Columbia Circuit,[1] which reversed the decision of the Federal Communications Commission to grandfather

[1] *National Citizens Committee for Broadcasting* v. *FCC*, 555 F. 2d 938 (D.C. Cir. 1977).

virtually all existing co-located newspaper/broadcast combinations.[2] The Court is respectfully referred to the preceding Motion for Leave to File Brief *Amici Curiae* for a description of the interest of *amici*.

Summary of Argument

The *Second Report* was an attempt to establish a comprehensive policy for dealing with increasing monopolization of mass media in many American communities. A flood of petitions from the Justice Department and public groups had asked that television renewals be conditioned on separation of co-owned media. At first the Commission entertained such petitions.[3] Subsequently, it denied them pending completion of this rule-making. Finally, in its *Second Report,* the Commission concluded that the First Amendment policy of maximum diversity of program sources compelled it to ban future co-located newspaper/television combinations. However, the Commission grandfathered existing newspaper-television combinations except in "egregious" cases. The agency justified the exemption from its newly clarified policy on the basis of "competing policies . . . not previously considered" (555 F.2d at 963-65).

The Commission further insulated major market cross-owners by establishing a standard of pleading that made it virtually impossible for petitioners to deny to show in individual cases that a renewal hearing was required on concentration of control issues. The Second Report stated that

> . . . absent a showing of economic monopolization that might warrant actions under the Sherman Act, it would not be our view that such [concentration] arguments would raise valid issues necessitating the designation of renewal applications for hearing. 50 FCC 2d at 1088.

[2] *Second Report and Order,* Docket 18110, 50 FCC 2d 1046 (1975), *reconsideration,* 53 FCC 2d 589 (1975) (hereinafter "Second Report").

[3] See *e.g., Frontier Broadcasting Co.,* 21 FCC 2d 570 (1970); *Chronicle Broadcasting Co.,* 16 FCC 2d 882 (1969).

The Circuit Court found little record support for the Commission's invocation of competing policies. Nor did it find any rationality in the Commission's decision to abandon the First Amendment goal of maximum diversity of media voices in all markets on the basis of the unproved possibility of adverse consequences in some markets. Thus, the Circuit Court found the Commission's exemption of existing licensees was "arbitrary and capricious" and required reversal. 5 U.S.C. § 706(2)(A); 555 F.2d at 956.

The Circuit Court also faulted the Commission's *ad hoc* test for designation of renewal hearings on issues of media concentration. It found the Commission had unreasonably substituted an antitrust standard for the proper First Amendment/public interest test, and that its new standard "unreasonably curtails the interests of petitioners to deny" (555 F.2d at fn. 108).

The Commission's disposition of license renewal challenges in which *amici* have participated proves that the Court's evaluation of the *ad hoc* test is accurate. The "economic monopolization" standard does not take into account the First Amendment goal of maximum diversity of media viewpoints, which should be the Commission's paramount concern. Extreme cases of media concentration do not trigger *ad hoc* scrutiny.

These challenges also contrast the Commission's willingness to waive the cross-ownership rule at the request of licensees when special circumstances are shown, with its absolute refusal to examine special circumstances in waiver requests by public complainants.

Finally, *amici's* experience demonstrates that the *ad hoc* standard, coupled with the Commission's refusal to either

(a) place upon the licensee the burden of proving facts known only to it, or (b) give citizen petitioners the discovery tools necessary to establish the required facts, has made it virtually impossible for petitioners to deny to meet the Commission's pleading threshold. The *ad hoc* test thereby immunizes cross-owners from renewal challenges.

ARGUMENT

I

The *Second Report* finds that the First Amendment goal of diversity of media voices has primary significance. But it inconsistently perpetuates extreme media monopolies.

Section 309(a) of the Communications Act provides that Commission may not grant a broadcast license without making a finding that the grant will serve "the public interest, convenience and necessity." 47 U.S.C. § 309(a). Not the least among the public interest considerations it must evaluate on every renewal is the First Amendment policy of encouraging a maximum number of diverse sources of information.[4]

The Commission recognized the inextricable link between diversity and the public interest in the *Second Report:*

> If our democratic society is to function, *nothing can be more important than insuring that there is a free flow of information from as many divergent sources as possible.* This is not a reflection on the efforts of combination owners in diligently serving the public interest. Rather, it is a recognition that it is unrealistic to expect true diversity from a commonly owned station-

[4] *Scripps-Howard Television, Inc.* v. *FCC*, 189 F. 2d 677 (D.C. Cir. 1951); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969).

> newspaper combination. The divergency of their viewpoints cannot be expected to be the same as if they were antagonistically run. 50 FCC 2d at 1079 (emphasis added).

This conclusion should have led the Commission to deny renewal of licenses of co-located newspaper/broadcast combinations (555 F. 2d 962). If the policy of promoting "the widest possible dissemination of information from diverse and antagonistic sources . . ." means anything, it means that the government should not entrust broadcast channels capable of wide dissemination of information to owners who already have the capacity to drown out any possible rival. However, the Commission ignored even its own assessment of First Amendment and public interest requirements and sanctioned renewal of licenses except in "egregious" cases where the "need is overwhelming and the evidence unambiguous" (50 FCC 2d at 1083). Its action is totally inconsistent with the First Amendment, the public interest and its own pronouncements (555 F. 2d at 962-63).

The Commission's illogic is compounded by its *ad hoc* standard for examining the effect of cross-ownership in the context of license renewal challenges. It refuses to examine cases of extreme concentration—and the dangers it poses to the diversity of information—absent "a showing of economic monopolization that might warrant actions under the Sherman Act . . ." (50 FCC 2d at 1088). This policy, as *amici* learned, leaves untouched some of the severest instances of media concentration in the country.

The *amici* have participated in renewal challenges against Newhouse Broadcasting Corporation's television stations in Syracuse, New York and Birmingham, Alabama (WSYR-

[5] *Associated Press* v. *United States*, 326 U.S. 1 at 20 (1945); See also *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 390.

TV and WAPI-TV, respectively), and Cox Broadcasting Corporation's station in Atlanta, Georgia (WSB-TV).[6]

Newhouse is sole owner of the only newspapers of general circulation in Syracuse, *i.e.*, the morning, afternoon and Sunday newspapers. It has the most desirable television frequency and leading AM-FM radio stations, a satellite television station in Elmira, and ten cable franchises in and near the Syracuse SMSA. It is estimated that Newhouse obtains 81% of the local advertising revenues in the Syracuse SMSA and a larger share in the City itself.

WAPI is one of two VHF television stations in Birmingham. Newhouse also owns AM and FM radio stations in Birmingham, and a cable system in Anniston, Alabama. Newhouse owns the only morning and Sunday newspaper of general circulation, the *Birmingham News,* which has a joint operating agreement with the only evening paper, the *Post-Herald.* The terms of the joint operating agreement are secret.[7] However, it is known that the *News* acts as the exclusive agent of the *Post-Herald* for distribution and for the sale of advertising. The *Post-Herald* is printed in the *News* plant. Except for a separate editorial staff, the latter has no observable independent existence. It was alleged that Newhouse controls 80.6% of local advertising revenues in the Birmingham SMSA and that its market share is even higher in the City itself.

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[6] In both 1972 and 1975, the Syracuse Coalition for the Free Flow of Information in the Broadcast Media challenged Newhouse's license to operate WSYR-TV, alleging undue concentration of control over local media. The Magic City Communications Coalition challenged Newhouse's licenses for WAPI-TV, Birmingham, on similar grounds in March, 1973. UCC provided legal and technical assistance to the Syracuse and Birmingham groups. In March, 1976 the Atlanta branch of the NAACP and the Georgia ACLU petitioned to deny Cox's Atlanta license renewals.

[7] A copy of the agreement is on file with the Department of Justice but is not publicly available. Petitioner's request to the Commission for production of the agreement was denied.

In Atlanta, Cox Broadcasting Corporation publishes the only two newspapers of general circulation. It owns WSB-TV, WSB-AM, a 50,000 watt "clear channel" station, and WSB-FM. It holds cable franchises for the City of Atlanta and its suburbs. It is alleged that Cox controls 83% of local advertising revenues in the Atlanta SMSA and an even higher share in the City itself.

It is believed that the share of local advertising revenues is a rough measure of the circulation of local news, and opinions on local issues. Various formulae have been used by scholars to measure concentration of control over the dissemination of news and opinion. One such measure indicates that 88% of Syracuse residents get most of their news from Newhouse. The comparable figures for Birmingham and Atlanta are 88% and 89%.[8]

In the nature of things it is difficult to demonstrate, particularly under First Amendment constraints, that Newhouse or Cox is less vigorous in pursuing the news, in exposing injustice and in airing controversy than television stations or newspapers in more competitive markets; but it is common experience that market dominance of this degree leads to a decline in competitive zeal. And, as will be shown below, there are substantial allegations of inferior performance by these cross-owners.[9]

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[8] These figures are taken from the Milwaukee "Most News From" Index which, along with the figures indicating advertising revenue shares, were before the Commission in its cross-ownership rulemaking docket.

[9] For example, a 1976 survey on local news on VHF stations in the St. Louis market found that Newhouse-owned KTVI-TV admitted it had a "lackluster" news operation with ratings that up to the beginning of 1975 could "always be counted on the fingers of one hand." *Broadcasting,* January 5, 1976, p. 89. The Department of Justice has alleged in a petition to deny against KTVI that Newhouse monopolizes the newspapers of general circulation in St. Louis. *Newhouse Broadcasting Corp. (KTVI-TV),* 62 FCC 2d 280 (1976).

When the media dominance enjoyed by Newhouse and Cox was brought to the Commission's attention by petitions to deny license renewal, including requests for waiver of the *Second Report,* it refused to conduct hearings, stating that citizen petitioners had failed to plead "economic monopolization that might warrant actions under the Sherman Act"—the *ad hoc* test of the *Second Report.*[10]

This Court has held that the Commission cannot, as it did in these cases, substitute antitrust laws for its own public interest standard. *United States* v. *RCA,* 358 U.S. 334 (1959). Very recently, the Commision itself seems to have recognized the deficiencies in its *ad hoc* standard. See fn. 108 of the Circuit Court's opinion; *WGAL-TV,* 39 RR 2d 457 (1976).

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[10] *Newhouse Broadcasting Corporation (WAPI-TV),* 59 FCC 2d 218 (1976), *reconsideration denied,* 61 FCC 2d 718 (1976), *appeal pending sub nom. Magic City Communications Coalition* v. *FCC,* D.C. Cir. Case No. 76-2088 (This appeal has been held in abeyance pending this Court's disposition of the instant proceeding); *Newhouse Broadcasting Corporation (WSYR-TV),* 51 FCC 2d 336 (1975), *appeal pending sub nom. Syracuse Coalition for the Free Flow of Information in the Broadcast Media* v. *FCC,* D.C. Cir. No. 75-1308. (The District of Columbia Circuit has, *sua sponte,* delayed the disposition of this appeal pending this Court's decision in the instant case). *Newhouse Broadcasting Corporation (WSYR-TV),* 62 FCC 2d 271 (1977), *reconsideration pending.* The petition against Cox is still pending at the Commission, but its refusal to designate a hearing for almost two years is an indication that it did not meet the pleading standards of the *ad hoc* test. *Compare WGAL-TV,* 39 RR 2d 457 (1976), where a hearing was designated on concentration issues.

II

The rationales for grandfathering existing cross-owners do not apply in Birmingham, Syracuse or Atlanta. Nevertheless, the Commission refused to consider waivers.

The Commission justified its exemption of existing cross-ownerships from the policy of diversity on the basis of competing policies not previously considered. These were:

(a) Disruption of the continuity of operation and proven superior service;[11]

(b) preservation of local ownership and involvement of ownership in management;

(c) local economic dislocations; and

(d) unfairness to existing licenses.[12]

Amici will not duplicate the analysis of the Circuit Court, which demonstrates that these rationales lack record support and cannot outweigh the long-standing policy of diversity of media ownership unless shown to exist in particular instances (555 F. 2d at 963-65). Our focus here is that the exemption of existing cross-owners is buttressed by a unique unwillingness to consider the facts of particular cases. A long series of decisions have held that, whatever its rules, the Commission must take a "hard look" at requests for exceptions and must consider special

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[11] This rationale—only one of many in the *Second Report*—has loomed ever-larger in the Commission's attempt to justify grandfathering. *Compare* 50 FCC 2d at 1973 with the Commission's Brief in this proceeding, pp. 23-26.

[12] This rationale, which is addressed as a separate point in the Commission's Brief (p. 27), was only an intimation in the *Second Report.*

circumstances.[13] When First Amendment policies are alleged in seeking waivers a particularly close examination is required.[14]

The Commission in this docket has stated that it will follow the "hard look" doctrine only to perpetuate cross-ownership and not to end them. It will grant waivers even to "egregious" monopolists who establish that unusual hardships or other circumstances in the particular market reverse the public interest presumptions on which the divestiture rule is based. It will not, however, entertain requests for waiver by members of the public under like circumstances. It therefore discriminates unfairly in favor of its licensees.[15]

Amici have sought precisely this kind of "hard look" in the Newhouse and Cox cases, alleging unusually high degrees of media concentration in important markets on one side of the scale, and, on the other, almost total absence of presumed injury to competing policies if corrective action is taken.

A. Continuity of Operation

Newhouse is not a "proven conscientious licensee" (FCC Br. p. 12). Its record of service to the public is poor, rather than "superior."[16] Newhouse has little need

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[13] *Federal Power Commission* v. *Texaco*, 377 U.S. 33 (1964); *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956); *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943); *WAIT Radio* v. *FCC*, 418 F. 2d 1153 (D.C. Cir. 1969).

[14] *WAIT Radio* v. *FCC*, *supra*.

[15] *Office of Communication of United Church of Christ* v. *FCC*, 465 F. 2d 519 (D.C. Cir. 1972); *Hale* v. *FCC*, 425 F. 2d 556 (D.C. Cir. 1970).

[16] The petitions to deny claimed that Newhouse's programming was inadequate and unresponsive to the needs of minorities and women. On the basis of Newhouse's own EEO reports, it was

(footnote continued on following page)

to fear of offending groups which have almost nowhere else to turn for attention to their needs.

The Commission's 1974 Programming Record[17] showed that WSYR presented less local news, less public affairs and generally less local programming than the two weaker Syracuse stations. A report on stations in the top 50 ADI markets indicated that the two Newhouse stations (WAPI in Birmingham and KTVI in St. Louis) ranked 119th and 111th out of 138 in public affairs programming. Newhouse stations were also far below average in the employment of Blacks in upper job categories.[18] A 1974 survey by the National Black Media Coalition ranked Newhouse among the four worst group owners in the country. WAPI-TV ranked 6th worst in news and 7th worst in local programming.[19]

Cox is similarly no model of superior public service. During WSB-TV's 1970-73 license term, only 1.4% of its air time was devoted to local public affairs programming. *Amici* alleged that Cox had underrepresented Blacks in its local programming and had discriminated against women and minorities in its employment practices.

There is no reason to assume that a new licensee would be poorer than Newhouse or Cox. Certainly no such presumption should be indulged in the face of contrary allegations and denial of hearing.

(footnote continued from preceding page)

alleged that its stations employed insufficient numbers of women and minorities in the upper job categories. This allegation of employment discrimination was bolstered by an individual employee complaint.

[17] This is a public document compiled annually from reports filed by licensees on FCC Form 303-A.

[18] *Broadcasting in America, 1975, access Magazine*, December 1, 1975.

[19] National Black Media Coalition "TV Stations with Most/Least News, Public Affairs, Local Programming" (October 25, 1974).

B. Local Ownership and Integration of Ownership and Management

Samuel I. Newhouse resides on Park Avenue in New York City. Mr. Newhouse owns newspapers in Jersey City and Newark (N.J.); Syracuse, Jamaica and Staten Island (N.Y.); St. Louis (Mo.); Portland (Ore.); Harrisburg (Pa.); Birmingham, Huntsville and Mobile (Ala.); New Orleans (La.); Springfield (Mass.); Pasagoula (Miss.) and Cleveland (Ohio).[20] He also publishes at least five magazines in New York City and operates numerous broadcast stations, CATV systems and microwave facilities in various parts of the United States.

Cox controls newspapers in Dayton and Springfield (Ohio); Miami, Palm Beach and West Palm Beach (Fla.) and Atlanta (Ga.). It controls broadcast stations in Dayton, Miami, Atlanta, Charlotte (N.C.), San Francisco, Pittsburgh and Los Angeles. It controls cable systems in about 40 different communities.[21]

Neither Mr. Newhouse nor the Cox family participates directly in the management of WSYR, WAPI or WSB. There is no reason to think that they have experience with the unmet needs of the communities of license. As in most cross-ownership situations, they are absentee owners. A sale or exchange might reintroduce local owner-management.

C. Economic Dislocations

There is no evidence that a sale of these three stations would cause economic dislocation or excessive demand for equity capital.[22] A sufficient grace period before divesti-

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[20] *Television Factbook*, 1977, Services Volume p. 144-a.

[21] *Id.* at 144-a and 915-a.

[22] Commissioner Hooks noted that the Commission processed 1129 assignment and transfer applications in the year preceding the *Second Report*.

ture would insure that Newhouse and Cox could get a fair price for their stations. Exchanges with other cross-owners are feasible. In view of the length of time the licenses have been held, each owner would probably realize a staggering profit on his initial investment. Newhouse and Cox are well able to survive such a forced sale and even to finance a purchaser if necessary. Newhouse's consolidated revenues in 1971 were estimated at $450 million and its after-tax profits at $18 million.[23]

The impact of divestiture on programming should be no different than in the case of voluntary transfers, which are routinely approved by the Commission. Finally, private financial losses are not a relevant Commission concern (555 F. 2d 964-65).

D. Unfairness to Licensees

Even when a broadcaster has a record of superior service, the Commission cannot sacrifice the public interest in the name of "fairness" to the licensee. Every licensee has specifically waived any right to its frequency as against the regulatory power of the United States (47 U.S.C. § 304). One who chooses to apply for a public franchise must take the bitter with the sweet.[24] There can be no claim that either Newhouse or Cox would suffer any particular unfairness from divestiture, such as might occur if the stations had just "turned the corner" after years of unprofitable operation. Obviously, Newhouse and Cox have profited enormously from their stewardship of public channels. Clearly their newspaper monopolies will continue to be enormously profitable with or without the commonly-owned television stations.

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[23] Bishop, *The Rush to Chain Ownership*, Columbia Journalism Review, November/December, 1972, p. 14.

[24] *Citizens Committee to Save WEFM* v. *FCC*, 506 F. 2d 246, 271 (D.C. Cir. 1974) (Bazelon, C. J., concurring); Circuit Court opinion, 555 F. 2d at 964-65.

As evidenced by its disposition of the challenges in Birmingham and Syracuse, the Commission refuses to take a hard look at First Amendment and competing public interest considerations in particular renewal proceedings. It conclusively presumes that the First Amendment factors have inferior weight without regard for the actual facts.

III

The Commission's *ad hoc* test cannot reasonably be met. The test serves to immunize cross-owners from renewal challenges.

In applying its *ad hoc* standard, the Commission has required *prima facie* proof of a Sherman Act violation at the pleading stage; it has refused to follow established antitrust precedents and presumptions that would shift the burden of proof to the cross-owner. It has insisted that citizen petitioners come forward with evidence of specific abuses; but it has denied citizens access to the discovery necessary to uncover the relevant facts.[25] In short, the *ad hoc* standard leaves cross-owners in a better position vis-a-vis license renewal challenges than ever before.[26] They are effectively immunized from renewal challenges on concentration grounds.

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[25] Petitioners to deny are not entitled to discovery until the Commission designates a hearing. This leads to a procedural Catch 22 whereby petitioners are required to plead substantial and material facts, but are denied the tools by which to obtain them. See *Bilingual Bicultural Coalition on Mass Media* v. *FCC*, 492 F. 2d 656, 659 (D.C. Cir. 1974).

[26] See cases cited in note 3, *supra*. Even before the *Second Report*, if a petition to deny alleged actual violation of the antitrust laws a hearing would have been required to examine the licensee's character. The *ad hoc* standard, then, added no new bases for petitions against concentrated owners.

A. The Commission Refuses To Presume Monopolization or Harm Upon a Showing of Extreme Concentration.

The offense of monopolization under Section 2 of the Sherman Act has traditionally been defined to consist of monopoly power plus a certain deliberateness. *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). In *Grinnell*, this Court defined market power as (1) the possession of monopoly power and (2) the wilful acquisition or maintenance of that power, *Id.* at 570-71. The Commission appears to have adopted this definition and uses "market power" as the quantum of proof required of petitioners to deny.[27]

However, in *Grinnell*, this Court also observed that "the existence of such [market] power may be inferred from the predominant share of the market." *Id.* at 571. Once the plaintiffs had established defendant's dominant (85%) market share in *Grinnell*, the burden of proof shifted to the defendant to *dis*prove monopoly power (236 F. Supp. 244, 257).

The Commission, on the other hand, regarded similar, unrefuted evidence of Newhouse's dominant market share in the Birmingham SMSA (80.6%) and Syracuse (81%) to be a "bald allegation" which failed to demonstrate market power.[28] It would not infer monopoly power or shift the burden to the cross-owner. Nor, ignoring other well-established antitrust precedent, would the Commission consider the cross-owner's dominance, coupled with its acquisitive practices, as a rebuttable presumption of intent to monopolize.[29] Instead, the Commission un-

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[27] See, *e.g.*, the Commission's decisions on the WAPI (59 FCC 2d 218) and WSYR (62 FCC 2d 271) renewal challenges.

[28] See, *e.g.*, 59 FCC 2d 218 at Par. 44; 62 FCC 2d 271 at Par. 24.

[29] *United States* v. *E. I. DuPont de Nemours*, 351 U.S. 377 (1956); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2nd Cir. 1945).

realistically and unfairly placed the burden on citizen petitioners, who lack discovery rights, to provide specific evidence of economic abuse, injury or deliberate monopolization. As noted by Judge Tamm:

> These procedural standards can be, in effect, a backhanded method of barring virtually all public intervenors from raising questions relating to concentration of control. *Hale* v. *FCC*, 425 F. 2d 556, 565 (D.C. Cir. 1970)

B. The Commission Has Placed An Unfair and Unreasonable Burden on Citizen Petitioners To Prove Monopolistic Abuses.

The most telling evidence of the Commission's attempt to immunize existing cross-owners through the application of its *ad hoc* test is its insistence on—and treatment of—evidence of specific monopolistic abuses.

Amici alleged that both Newhouse and Cox as a matter of deliberate corporate policy seek to combine competing media ownerships. Every Newhouse television station is combined with an AM/FM radio station and a virtual newspaper monopoly. Two out of five Cox television stations are combined with daily newspaper monopolies and AM and FM radio stations.

A common strategy of both licensees is a strenuous effort to head off competition from CATV systems. The most striking example of this is Cox, which succeeded in obtaining all but one major cable franchise in Atlanta and then merged with its only cable competitor. *Amici* alleged that Cox is now sitting on its franchises doing minimal construction and carrying minimum signals, including only one radio station, its own WSB. Clearly the owner of Atlanta's leading television and radio stations has no incentive to import competing television and radio signals or to carry cable programming which might divide its audience and revenues.

Newhouse has also fought to control the cable systems in Syracuse and Birmingham. *Amici* alleged that when the City of Syracuse transmitted a home rule message to the New York State Legislature seeking authority for a municipal cable system, Newhouse editorialized vigorously against it and succeeded in persuading the Syracuse legislators to have their bills recommitted. They alleged that in Birmingham Newhouse sought to use its control of an advantageous head-end site to get an exclusive cable franchise. Newhouse has not yet succeeded in getting either the Syracuse or Birmingham cable franchise, but it has delayed cable competition by others. Newhouse has succeeded in getting ten cable franchises within the WSYR Grade B contour and one within the WAPI Grade B contour. These franchises put it in a position to limit the carriage of signals which compete with its own.

Amici also alleged that both Newhouse and Cox used their editorial and news columns to advance their own corporate interests.

The charges against Newhouse were either dismissed out of hand as "patently lacking in specificity" (59 FCC 2d 218 at Par. 47), or were determined to be insubstantial simply because the licensee denied their existence.[30] The abuses contained in the Cox petition have failed to lead to an evidentiary hearing.

The Commission has yet to give citizen challengers a clue as to the kind of evidence required to show "market power." Nor has it ever granted citizens the right to conduct pre-designation discovery to develop more detailed evidence of "abuse", illogically citing their failure to dem-

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[30] *E.g., Id.* at Pars. 45-46; 62 FCC 2d 271 at Pars. 25-27. *See Black Broadcasting Coalition of Richmond* v. *FCC*, 556 F. 2d 59 (D.C. Cir. 1977).

onstrate how discovery would help to document their allegations! (59 FCC 2d 218 at Par. 3).

Furthermore, there is no constitutionally palatable means by which those suffering under the restraints of media concentration can satisfy the Commission that their injuries are real and not "abstract". Attempts to establish that a cross-owner has limited the diversity of news and opinion or that improper influences have affected its editorial and news policies would inevitably involve the Commission in the scrutiny of program content and in sanctions for the manner in which news was treated.[31] Clearly structural market control is a "less restrictive alternative" than the Commission's specific abuse approach.[32]

As noted, the Commission has made it virtually impossible for petitioners to meet the severe Sherman Act "required conduct" threshold. Predominant market share raises no presumption of monopolization. No discovery tools are available to help document allegations of abuse. Affidavits regarding abuses are ignored or found to be unproved on the basis of confusion between allegations and testimonial evidence.[33]

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[31] Such governmental intrusions would raise serious threats to First Amendment protections. See *Columbia Broadcasting Co., Inc.* v. *Democratic National Committee*, 412 U.S. 94, 110-111 (1973).

[32] *Brandywine-Main Line Radio* v. *FCC*, 473 F. 2d 16 (D.C. Cir. 1972) (dissenting opinion of Bazelon, C.J. at fn. 46).

[33] *Cf. Office of Communication of the United Church of Christ* v. *FCC*, 425 F. 2d 543 at 548 (D.C. Cir. 1969).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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